

Amendment No. 1 to SB1203

Stanley
Signature of Sponsor

AMEND Senate Bill No. 1203*

House Bill No. 2085

by deleting all of the language after the enacting clause and by substituting instead the following:

SECTION 1. Tennessee Code Annotated, Title 4, is amended by adding Sections 2 through 14 of this act as a new chapter.

SECTION 2. This chapter shall be known and may be cited as the “Tennessee Small Business Investment Company Credit Act”.

SECTION 3. For the purposes of this chapter:

(1) “Affiliate” means:

(A)

(i) Any person who, directly or indirectly, beneficially owns, controls, or holds power to vote fifteen percent (15%) or more of the outstanding voting securities or other voting ownership interest of a TNInvestco or insurance company; or

(ii) Any person, fifteen percent (15%) or more of whose outstanding voting securities or other voting ownership interests are directly or indirectly beneficially owned, controlled, or held with power to vote by a TNInvestco or insurance company.

(B) Notwithstanding this subdivision (2), an investment by a participating investor in a TNInvestco pursuant to an allocation of premium tax credits under this chapter does not cause that TNInvestco to become an affiliate of that participating investor;

(2) “Allocation date” means the date on which credits under Section 6 are allocated to the participating investors of a TNInvestco under this chapter;

(3) "Base investment amount" means eighty percent (80%) of the amount of tax credits allocated to a qualified TNInvestco;

(4) "Designated capital" means an amount of money that:

(A) Is invested by a participating investor in a TNInvestco; and

(B) Fully funds the purchase price of a participating investor's equity interest in a TNInvestco or a qualified debt instrument issued by a TNInvestco, or both;

(5) "Participating investor" means any insurer as defined in title 56 that contributes designated capital pursuant to this chapter;

(6) "Person" means any natural person or entity, including, but not limited to, a corporation, general or limited partnership, trust, or limited liability company;

(7) "Profit share percentage" means the portion of the profits from a TNInvestco that is shared with the state;

(8)

(A) "Qualified business" means a business that is independently owned and operated and meets all of the following requirements:

(i) It is headquartered in this state, its principal business operations are located in this state, and at least sixty percent (60%) of its employees are located in this state;

(ii) It has not more than one hundred (100) employees;

(iii) It is not principally engaged in:

(a) Professional services provided by accountants, doctors, or lawyers;

(b) Banking or lending;

(c) Real estate development;

(d) Insurance;

(e) Oil and gas exploration; or

(f) Direct gambling activities; and

(iv) It is not a franchise of, and has no financial relationship with, a TNInvestco or any affiliate of a TNInvestco prior to a TNInvestco's first qualified investment in the business.

(B) A business classified as a qualified business at the time of the first qualified investment in the business shall remain classified as a qualified business and may receive continuing qualified investments from any TNInvestco even though the business may not meet the definition of a qualified business at the time of the continuing investments. Such continuing investments shall constitute qualified investments;

(9) "Qualified debt instrument" means a debt instrument issued by a TNInvestco which meets all of the following criteria:

(A) It is issued at par value or a premium; and

(B) It has an original maturity date of at least four (4) years from the date of issuance, and a repayment schedule which is no more rapid than a level principal amortization over four (4) years;

(10) "Qualified distribution" means any distribution or payment not made to a participating investor or affiliate of a participating investor by a TNInvestco in connection with the following:

(A) Costs and expenses of forming, syndicating, and organizing the TNInvestco, including fees paid for professional services;

(B) An annual management fee not to exceed two percent (2%) of designated capital on an annual basis to offset the costs and expenses of managing and operating a TNInvestco;

(C) Reasonable and necessary fees in accordance with industry custom for ongoing professional services, including, but not limited to, legal and accounting services related to the operation of a TNInvestco, not including any lobbying or governmental relations;

(D) Any increase or projected increase in federal or state taxes, including penalties and related interest of the equity owners of a TNInvestco resulting from the earnings or other tax liability of a TNInvestco to the extent that the increase is related to the ownership, management, or operation of a TNInvestco;

(E) Payments of principal and interest to holders of qualified debt instruments issued by a TNInvestco may be made without restriction whatsoever;

(11) "Qualified investment" means the investment of money by a TNInvestco in a qualified business for the purchase of any debt, debt participation, equity, or hybrid security of any nature and description whatsoever, including a debt instrument or security that has the characteristics of debt but which provides for conversion into equity or equity participation instruments such as options or warrants. Any repayment of a qualified investment prior to one (1) year from the date of issuance shall result in the amount of such qualified investment being reduced by fifty percent (50%) for purposes of the cumulative investment requirement. Qualified investments determined to be seed or early stage investments shall be increased by three hundred percent (300%) for purposes of the cumulative investment requirement;

(12) "State premium tax liability" means any liability incurred by an insurance company under the provisions of title 56 or in the case of a repeal or a reduction by the state of the liability imposed by title 56, any other tax liability imposed upon an insurance company by the state; and

(13) "TNInvestco" means a partnership, corporation, trust, or limited liability company, whether organized on a for-profit or not-for-profit basis that:

(A)

(i) Has been based, as defined by the location of its primary office, in this state for at least five (5) years;

(ii) Has at least two (2) investment managers with five (5) or more years of investment experience; and

(iii) Is certified by the department of economic and community development and the department of revenue to participate in the tax credit program established by this chapter based on such criteria as determined by the commissioners of such departments in consultation with the Tennessee Technology Development Corporation; or

(B) Is a partnership, corporation, trust, or limited liability company, whether organized on a for-profit or not-for-profit basis that submits a joint application with a person that meets the criteria set out in subdivisions (1)(A)(i) and (1)(A)(ii) and is certified by the department of economic and community development and the department of revenue to participate in the tax credit program established by this chapter based on such criteria as determined by the commissioners of such departments in consultation with Tennessee Technology Development Corporation.

SECTION 4.

(a) The department of revenue shall provide a standardized form for use in applying for a business investment credit.

(b) An applicant for certification is required to:

(1) File an application with the department of economic and community development;

(2) Pay a nonrefundable application fee of seven thousand five hundred dollars (\$7,500) at the time of filing the application;

(3) Submit as part of its application an audited balance sheet that contains an unqualified opinion of an independent certified public accountant issued not more than thirty-five (35) days before the application date that states that the applicant has an equity capitalization

of five hundred thousand dollars (\$500,000) or more in the form of unencumbered cash, marketable securities, or other liquid assets;

(c) The department of economic and community development and the department of revenue shall review the organizational documents of each applicant for certification and determine whether the applicant has satisfied the requirements of this chapter.

(d) Within forty-five (45) days after the receipt of an application, the department of economic and community development shall either issue the certification or shall communicate in detail to the applicant the department's grounds for refusal including suggestions for the removal of such grounds.

(e) The department of economic and community development shall begin accepting applications for certification as a TNInvestco by October 1, 2009.

SECTION 5.

(a) No insurance company or affiliate of an insurance company shall, directly or indirectly: (1) Beneficially own, whether through rights, options, convertible interest, or otherwise, fifteen percent (15%) or more of the voting securities or other voting ownership interest of a TNInvestco;

(2) Manage a TNInvestco; or

(3) Control the direction of investments for a TNInvestco.

(b) A TNInvestco may obtain one (1) or more guaranties, indemnities, bonds, insurance policies, or other payment undertakings for the benefit of the TNInvestco's participating investors from any entity, provided that in no case can more than one (1) participating investor of a TNInvestco on an aggregate basis with all affiliates of such participating investor be entitled to provide such guaranties, indemnities, bonds, insurance policies, or other payment undertakings in favor of the participating investors of a TNInvestco and its affiliates in this state.

(c) This section does not preclude a participating investor, insurance company, or other party from exercising its legal rights and remedies, including, without limitation, interim management of a TNInvestco, in the event that a TNInvestco is in default of its statutory obligations or its contractual obligations to such participating investor, insurance company, or other party; from monitoring a TNInvestco to ensure its compliance with this section; or from disallowing any investments that have not been approved by the department of economic and community development.

(d) The department of economic and community development may contract with an independent third party to review, investigate, and certify that applicants comply with this section.

SECTION 6.

(a) The aggregate amount of investment tax credits to be allocated to all participating investors of TNInvestcos under this chapter shall not exceed one hundred twenty million dollars (\$120,000,000). No TNInvestco, on an aggregate basis with its affiliates, may file credit allocation claims that exceed forty million dollars (\$40,000,000).

(b)

(1) Applications for certification shall contain such information as required by the department of revenue and the department of economic and community development, including statements regarding the ability to obtain the required investment commitments and the amount of the profit share percentage.

(2) Any TNInvestco that is awarded tax credits under this chapter based on an asserted ability to raise the required capital shall be subject to a five hundred thousand dollar (\$500,000) penalty for failure to perform. The proceeds from any such penalty shall be deposited into the

Tennessee Rural Opportunity Fund to further the state's economic development efforts.

(c) The department of revenue and the department of economic and community development, in consultation with the Tennessee Technology Development Corporation, shall review applications and allocate tax credits based on the estimated profit share percentage and the overall strength of the application. The awarding of tax credits shall be in the sole discretion of the commissioner of revenue and the commissioner of economic and community development.

(d) Within ten (10) business days after the department of economic and community development receives a credit allocation claim filed by a TNInvestco on behalf of one (1) or more of its participating investors, the department shall notify the TNInvestco of the amount of credits allocated to each of the participating investors of that TNInvestco. In the event a TNInvestco does not receive an investment of designated capital from each participating investor required to earn the amount of credits allocated to such participating investor within ten (10) business days of the TNInvestco's receipt of notice of allocation, then the TNInvestco shall notify the department on or before the next business day, and the credits allocated to such participating investor of the TNInvestco will be forfeited. The department shall then reallocate those forfeited credits using the methodology set out in this section.

(e) No participating investor, on an aggregate basis with its affiliates, shall file an allocation claim for more than twenty five percent (25%) of the maximum amount of investment tax credits authorized by this section, regardless of whether such claim is made in connection with one (1) or more TNInvestcos.

SECTION 7.

(a)

(1) To maintain certification, a TNInvestco shall make qualified investments as follows:

(A) Within two (2) years after the allocation date, a TNInvestco shall invest an amount equal to at least fifty percent (50%) of its designated capital in qualified investments; and

(B) Within three (3) years after the allocation date, a TNInvestco shall invest an amount equal to at least seventy percent (70%) of its designated capital in qualified investments.

(2) If, during year four (4) after the allocation date, or any year thereafter, the TNInvestco has invested less than eighty percent (80%) of its base investment amount in qualified investments, then neither the TNInvestco nor its affiliates shall be permitted to receive management fees for that year.

(3) Failure to meet the performance measures set out in subdivisions (a)(1) and (a)(2) during any calendar year shall result in the imposition of a two hundred fifty thousand dollar (\$250,000) penalty against the TNInvestco. The proceeds from any such penalty shall be deposited into the Tennessee Rural Opportunity Fund to further the state's economic development efforts. Funds related to the tax credit shall not be used to pay the penalty imposed under this subdivision (a)(3).

(b) Prior to making a proposed qualified investment in a specific business, a TNInvestco shall request from the department of economic and community development a written determination that the proposed investment will qualify as a qualified investment in a qualified business. The department shall notify a TNInvestco within ten (10) business days from the receipt of a request of its determination and an explanation thereof. If the department fails to notify the TNInvestco of its determination within the 10-business-day period, then the proposed investment shall be deemed to be a qualified investment in a

qualified business. If the department determines that the proposed investment does not meet the definition of a qualified investment, or that the business does not meet the definition of a qualified business, or both, then the department may nevertheless consider the proposed investment a qualified investment, and if necessary, the business a qualified business, if the department determines that the proposed investment will further state economic development.

(c) All designated capital not invested in qualified investments by a TNInvestco shall be held or invested in such manner as the TNInvestco, in its discretion, deems appropriate. Designated capital and proceeds of designated capital returned to a TNInvestco after being originally invested in qualified investments may be invested again in qualified investments and such investment shall count toward the requirements of subsection (a) of this section with respect to making investments of designated capital in qualified investments.

(d) In the first four (4) years following its allocation date, a TNInvestco's management fee shall not exceed two percent (2%) of its designated capital per annum. In the fifth through tenth years following its allocation date, a TNInvestco's management fee shall not exceed two percent (2%) of its qualified investments.

(e) No TNInvestco shall invest more than fifteen percent (15%) of its designated capital in any one (1) qualified business without the specific approval of the department of economic and community development.

SECTION 8.

(a) Each TNInvestco shall report the following to the department of economic and community development:

(1) As soon as practicable after the receipt of designated capital:

(A) The name of each participating investor from which the designated capital was received, including such participating investor's insurance tax identification number;

(B) The amount of each participating investor's investment of designated capital; and

(C) The date on which the designated capital was received;

(2) On an annual basis, on or before January 31 of each year:

(A) The amount of the TNInvestco's remaining uninvested designated capital at the end of the immediately preceding taxable year;

(B) Whether or not the TNInvestco has invested more than fifteen percent (15%) of its total designated capital in any one (1) business;

(C) All qualified investments that the TNInvestco has made in the previous taxable year, including the number of employees of each qualified business in which the TNInvestco has made investments at the time of such investment and as of December 1 of the preceding taxable year; and

(D) For any qualified business where the TNInvestco no longer has an investment, the TNInvestco must provide employment figures for that company as of the last day before the investment was terminated;

(3) Other information that the department of economic and community development may reasonably request that will help the department ascertain the impact of the TNInvestco program both directly and indirectly on the economy of the state, including, but not limited to, the number of jobs created by qualified businesses that have received qualified investments;

(4) Within ninety (90) days of the close of its fiscal year, annual audited financial statements of the TNInvestco, which shall include the opinion of an independent certified public accountant; and

(5) An “agreed upon procedures report” or equivalent regarding the operations of the TNInvestco.

(b) A TNInvestco shall pay to the department of economic and community development an annual, nonrefundable certification fee of five thousand dollars (\$5,000) on or before April 1, or ten thousand dollars (\$10,000) if later. No annual certification fee is required if the payment date for such fee is within six (6) months of the date a TNInvestco is first certified by the department.

(c) Upon satisfying the requirements of subdivision (a)(1)(B) of Section 7, a TNInvestco shall provide notice to the department of economic and community development and the department shall, within sixty (60) days of receipt of such notice, either confirm that the TNInvestco has satisfied the requirements of subdivision (a)(1)(B) of Section 7 as of such date or provide notice of non-compliance and an explanation of any existing deficiencies. If the department does not provide such notification within sixty (60) days, the TNInvestco shall be deemed to have met the requirements of subdivision (a)(1)(B) of Section 7.

SECTION 9. Profits from a TNInvestco may be paid out annually or upon designated liquidity events as established by the TNInvestco. No such distributions shall reduce the base investment amount during any calendar year. The profit share percentage shall be paid to the state in the same time and manner as all other distributions. Any such payments shall be deposited into the Tennessee Rural Opportunity Fund to further support the state’s economic development efforts. Investment capital liquidated during a liquidity event will be given a six-month “redemption period” for purposes of calculating the base investment amount for purposes of this section.

SECTION 10.

(a) The department of economic and community development shall conduct an annual review of each TNInvestco to determine if a TNInvestco is abiding by the requirements of the tax credit program established by this chapter and to ensure that no investments have been made in violation of this chapter. The cost of the annual review shall be paid by each TNInvestco according to a reasonable fee schedule promulgated by the department.

(b) The department of economic and community development shall provide the TNInvestco a summary of findings including any areas of noncompliance. The TNInvestco shall have sixty (60) days to cure any areas of noncompliance. Failure to cure the areas of noncompliance within sixty (60) days shall result in the imposition of a penalty of ten thousand dollars (\$10,000) per day until the noncompliance is cured. The proceeds from any such penalty shall be deposited into the Tennessee Rural Opportunity Fund to further the state's economic development efforts. No funds related to the tax credit shall be used to pay the penalty imposed under this subsection.

SECTION 11. Within six (6) months after the close of the investment period, the TNInvestco shall pay the state an amount equal to fifty percent (50%) of the designated capital or fifty percent (50%) of the value of the fund, whichever is less.

SECTION 12. All investments by participating investors for which tax credits are awarded under this chapter shall be registered or specifically exempt from registration.

SECTION 13. The department of economic and community development shall make an annual report to the governor and the chairs and ranking minority members of the committees having jurisdiction over taxes and economic development. The report shall include:

- (a) The number of TNInvestcos holding designated capital;
- (b) The amount of designated capital invested in each TNInvestco;
- (c) The cumulative amount that each TNInvestco has invested as of January 1, 2010, and the cumulative total each year thereafter;

(d) The cumulative amount of follow-on capital that the investments of each TNInvestco have created in terms of capital invested in qualified businesses at the same time as, or subsequent to, investments made by a TNInvestco in such businesses by sources other than TNInvestcos;

(e) The total amount of investment tax credits applied under this chapter for each year;

(f) The performance of each TNInvestco with regard to the requirements for continued certification;

(g) The classification of the companies in which each TNInvestco has invested according to industrial sector and size of company;

(h) The gross number of jobs created by investments made by each TNInvestco and the number of jobs retained;

(i) The location of the companies in which each TNInvestco has invested;

(j) Those TNInvestcos that have been decertified, including the reasons for decertification; and

(k) Other related information as necessary to evaluate the effect of this chapter on economic development.

SECTION 14.

(a) A participating investor shall earn a credit against the tax imposed pursuant to § 56-4-205 equal to one hundred percent (100%) of the participating investor's investment of designated capital in a TNInvestco. Beginning January 1, 2012, a participating investor may claim the credit as follows:

(1) In tax years 2012 and 2013, an amount equal to ten percent (10%) of the participating investor's investment of designated capital;

(2) In tax years 2014 and 2015, an amount equal to nine percent (9%) of the participating investor's investment of designated capital; and

(3) In tax years 2016, 2017, 2018 and 2019, an amount equal to eight percent (8%) of the participating investor's investment of designated capital.

(b) The credit for any taxable year shall not exceed the liability for tax under § 56-4-205 for such year. If the amount of the credit determined under this section for any taxable year exceeds the liability for tax under § 56-4-205, then the excess shall be an investment tax credit carryover to future taxable years without limitation. Credits may be used in connection with both final payments and prepayments of a participating investor's state premium tax liability.

(c) No participating investor claiming a credit under this section shall be required to pay any additional retaliatory tax levied as a result of claiming the credit.

(d) No participating investor shall be required to reduce the amount of tax pursuant to the state premium tax liability included by the participating investor in connection with ratemaking for any insurance contract written in this state because of a reduction in the participating investor's tax liability based on the tax credit allowed under this section.

(e) If the taxes paid by a participating investor with respect to the investor's state premium tax liability constitute a credit against any other tax that is imposed by this state, then the participating investor's credit against the other tax shall not be reduced by virtue of the reduction in the participating investor's tax liability based on the tax credit allowed under this section.

SECTION 15. This act shall take effect upon becoming a law, the public welfare requiring it.